(1)
Supreme Court, U.S.
FILED
952073 NOV 27 1995
OFFICE OF THE CLERK

No. 95-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

---

ARENA SPORTS, INC., EDGAR S. SKINNER, AND ANN J. SKINNER,

*Petitioners,*

v.

FIRST AMERICAN BANK OF VIRGINIA,

*Respondent.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

---

## PETITION FOR WRIT OF CERTIORARI

---

GARY M. BOWMAN, ESQ.
P.O. Box 2223
Roanoke, Virginia 24009
(703) 343-7949

*Counsel for Petitioners*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

36 pp

## QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR BY AFFIRMING THE DISTRICT COURT'S REFUSAL TO ALLOW THE PLAINTIFFS TO AMEND THEIR COMPLAINT WHEN THE DISTRICT COURT'S JURISDICTION WAS BASED UPON A CLAIM WHICH THE PLAINTIFFS DESIRED TO ABANDON BY THE AMENDMENT?

II. DID THE COURT OF APPEALS ERR BY AFFIRMING THE DISTRICT COURT'S EXERCISE OF JURISDICTION OVER THE STATE LAW CLAIMS IN THIS REMOVED CASE EVEN THOUGH THE PLAINTIFFS HAD ABANDONED THEIR FEDERAL CLAIM AND HAD MOVED TO REMAND THE CASE TO STATE COURT?

## TABLE OF CONTENTS


Opinions Issued By Lower Courts . . . . . 4

Statement of Appellate Jurisdiction . . . . . 4

Rule Involved in the Case . . . . . 5

Jurisdiction in Court of First Jurisdiction . . . . . 5

Statement of the Case . . . . . 6

Argument . . . . . 8

I. THE COURT OF APPEALS DISREGARDED THIS COURT'S RULING IN FOMAN V. DAVIS IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO ALLOW THE PLAINTIFFS TO AMEND THEIR COMPLAINT . . . . . 9

II. THE COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S EXERCISE PENDENT JURISDICTION OVER THE STATE LAW CLAIMS IN THIS REMOVED CASE . . . . . 14

Conclusion . . . . . 18

## TABLE OF AUTHORITIES

*Ansam Associates, Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442 (2d Cir. 1985) . . . . . 11

*Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985) . . . . . 11

*Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618 (11th Cir. 1983) . . . . . 11

*Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988) . . . . . 17

*Childers v. Indep. School Dist.*, 676 F.2d 1338 (10th Cir. 1982)

*Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Memorial Hospital, Inc.*, 795 F.2d 340, 342 (4th Cir. 1986) . . . . . 17

*Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470 (7th Cir. 1991) . . . . . 11

*Elema-Schonander, Inc. v. K.C.F. Medical Supply Co., Inc.*, 869 F.2d 1124 (8th Cir. 1989) . . . . . 11

*Foman v. Davis*, 371 U.S. 178 (1962) . . . . . 10

*Grant v. News Group Boston, Inc.*,
55 F.3d 1 (1st Cir. 1995) . . . . . 11

*Local 472 of United Ass'n of Journeymen and Apprentices of Plubing and Pipefitting Industry of U.S.A. and Canada v. Georgia Power Co.*, 684 F.2d 721 (11th Cir. 1982) . . . 12

*Rivanna Trawlers Unlimited v. Thompson Trawlers*,
840 F.2d 236, 243 (4th Cir. 1988) . . . . . 17

*Roberts v. Arizona Board of Regents*, 661 F.2d 796
(5th Cir. 1981) . . . . . 11

*United Mine Workers of America v. Gibbs*,
383 U.S. 715 (1966) . . . . . 14, 15

*Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243
(D.C. Cir. 1987) . . . . . 11

## OPINIONS ISSUED BY LOWER COURTS

Order, *Edgar S. Skinner; Ann J. Skinner; Arena Sports, Inc. v. First American Bank of Virginia*, Civil No. 93-0009H, U.S. District Court for the Western District of Virginia, October 20, 1993.

Unpublished per curiam opinion, *Edgar S. Skinner; Ann J. Skinner; Arena Sports, Inc. v. First American Bank of Virginia*, No. 93-2493, U.S. Court of Appeals for the Fourth Circuit, August 28, 1995 (disposition reported at 64 F.3d 659).

## STATEMENT OF APPELLATE JURISDICTION

This petition for certiorari seeks review of the per curiam opinion of the U.S. Court of Appeals for the Fourth Circuit issued on August 28, 1995 in *Edgar S. Skinner; Ann J. Skinner; Arena Sports, Inc. v. First American Bank of Virginia*, No. 93-2493. 11 U.S.C. § 1254 grants this Court jurisdiction to review the opinion of the Court of Appeals.[1]

---

[1] 28 U.S.C. § 1254 states, in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

## RULES INVOLVED IN THIS CASE

Federal Rule of Civil Procedure 15(a) states:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party my so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response of the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

## JURISDICTION IN COURT OF FIRST INSTANCE

Subject matter jurisdiction was invoked by the United States District Court for the Western District of Virginia pursuant to 28 U.S.C. § 1331 (Federal Question Jurisdiction). The case was removed by the defendant

from state court to the District Court because the original Motion for Judgment alleged a violation of the federal Bank Holding Company Act, 12 U.S.C. § 1972. The Court of Appeals had appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291 because the Order appealed from was the final order of the District Court.

## STATEMENT OF THE CASE

First American Bank of Virginia ("First American") provided financing to the plaintiffs for the construction of an indoor recreation facility in Stuarts Draft, Virginia. This lender liability case arose from the failure of First American Bank of Virginia to provide financing to the plaintiffs in accordance with First American's promises to the plaintiffs.

The plaintiffs filed a Motion for Judgment against First American in 1992. The Motion for Judgment stated numerous claims against First American. All of the claims alleged violations of state law except Count XII of the Motion for Judgment, which alleged a violation of a federal statute, the Bank Holding Company Act.

First American removed the case to the United States District Court for the Western District of Virginia on January 25, 1993, on the grounds that the Bank Holding Company Act claim created federal question jurisdiction.

The District Court issued a pre-trial order setting a discovery cut-off of August 20, 1993 and setting a

deadline for filing summary judgment motions of September 10, 1993.

At the conclusion of discovery, the plaintiffs made it quite clear to the District Court that the plaintiffs desired to abandon their federal claim. On September 7, 1993, seventeen days after the discovery cut-off, the plaintiffs moved to amend their complaint and the plaintiffs filed a proposed "First Amended Complaint," which did not include the federal Bank Holding Act claim. In their Motion to Amend Complaint, the plaintiffs conceded that discovery revealed that there were insufficient facts to support the claim. The plaintiffs also moved to remand the case to state court because the proposed amended complaint did not state a federal claim.

A hearing on the Motion to Amend Complaint was held on September 7, 1993, and plaintiffs' counsel clearly stated that the plaintiffs desired to abandon their federal claim and return to state court. The District Court did not rule on the motions.

The defendant moved for Summary Judgment on September 10, 1993. The plaintiffs responded to the Motion for Summary Judgment by conceding that the defendants were entitled to summary judgment on the federal Bank Holding Act claim, in addition to several other claims, because the plaintiffs conceded that discovery revealed that there were insufficient facts to support those claims. The plaintiffs also argued in their response to the motions for summary judgment that the District Court should not exercise pendent jurisdiction

over the case because there were no federal questions in issue.

A hearing on the defendant's Motion for Summary Judgment was held on October 15, 1993. The District Court denied the Plaintiffs' Motion to Amend Complaint, the Plaintiffs' Motion to Remand, and granted the Defendant's Motions for Summary Judgment.

The plaintiffs appealed the District Court's Order to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the District Court by a per curiam opinion issued on August 28, 1995. The plaintiffs argued on appeal that the District Court erred in refusing to allow the plaintiffs to amend their complaint and in failing to remand on the grounds that no source of federal jurisdiction would have remained once the federal claim was dropped. The Court of Appeals concluded that the district court did not err in denying the motion to amend and, therefore, the motion to remand was properly denied by the District Court.

## ARGUMENT

I. THE COURT OF APPEALS DISREGARDED THIS COURT'S RULING IN FORMAN V. DAVIS IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO ALLOW THE PLAINTIFFS TO AMEND THEIR COMPLAINT.

The Court of Appeals erred by affirming the District Court refusal to allow the plaintiffs to amend their

complaint and drop the federal Bank Holding Company Act claim since the amendment would have eliminated the basis for federal jurisdiction in the case. The Court of Appeals decision was a departure from the standards established by this Court in *Foman v. Davis*, 371 U.S. 178 (1962) and requires this Court to exercise its power of supervision.

Rule 15(a) of the Federal Rules of Civil Procedure states that "leave [to amend a complaint] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). This Court has stated that the mandate of Rule 15(a) is to be heeded. In *Foman v. Davis*, this Court stated:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

*Id.* at 182.

Although the District Court has the power to deny leave to amend, an outright refusal to grant leave to

amend without "substantial" reason to deny leave is not an exercise of discretion, but an abuse of discretion which is inconsistent with the Federal Rules of Civil Procedure. Further, it is an abuse of discretion for the District Court to refuse to permit an amendment to the complaint where the Court goes on to grant a motion to dismiss upon grounds that would have been eliminated by the proposed amendment. *Childers v. Indep. School Dist.*, 676 F.2d 1338 (10th Cir. 1982).

The Courts of Appeals have often applied *Foman v. Davis* in considering motions to amend. Motions to amend have been denied when filed after discovery has been completed and an amendment sought to "radically remake" a case. *See, e.g., Grant v. News Group Boston, Inc.*, 55 F.3d 1 (1st Cir. 1995); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243 (D.C. Cir. 1987). Leave to amend has been denied when first sought after the filing of a summary judgment motion. *See, e.g., Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470 (7th Cir. 1991); *Elema-Schonander, Inc. v. K.C.F. Medical Supply Co., Inc.*, 869 F.2d 1124 (8th Cir. 1989); *Ansam Associates, Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442 (2d Cir. 1985); *Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618 (11th Cir. 1983); *Roberts v. Arizona Board of Regents*, 661 F.2d 796 (5th Cir. 1981). The Courts of Appeals have also denied motions to amend when they were brought long after the filing of a case. For instance, in *Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985), the First Circuit affirmed the denial of leave to amend when the amendment was sought seven years after the filing of the complaint. *See, also,*

*Local 472 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S.A. and Canada v. Georgia Power Co.*, 684 F.2d 721 (11th Cir. 1982).

Under this legal standard, the District Court erred by not granting the plaintiffs leave to amend their complaint. The plaintiffs moved to amend their complaint immediately after the completion of discovery in order to delete "claims which are not supported by facts." The proposed amendment was brought only nine months after the filing of the complaint. The motion to amend was filed prior to the filing of a summary judgment motion.

Nevertheless, the Court of Appeals held that the District Court properly denied the motion to amend because the defendant First American "would have been prejudiced because it had already incurred significant time and expense in discovery and in preparation for a summary judgment motion" and "a large part of First American's discovery would likely have been unusable on a motion for summary judgment in state court." The Court of Appeals also stated that "the only apparent effect of the amendment on the Skinners would have been to permit them to dismiss their federal claim."

The Court of Appeals' decision was wrong in three ways. First, the Fourth Circuit deviated from the clear dictate of Rule 15(a) and the case law developed under that rule by denying the motion to amend merely because the defendant might not have been able to use all of the discovery material which it had developed to support a motion for summary judgment. This basis for denying a

motion for summary judgment. This basis for denying a motion to amend is unprecedented and could be applied in almost every case to frustrate the policy of Rule 15(a). Second, First American would not have been significantly prejudiced if the motion to amend had been granted. The fruits of their discovery effort could certainly have been used in state court in preparation for trial, and may have been used in pre-trial proceedings at trial.[2] The only benefit First American gained was avoiding a decision of the state law claims in state court, where they were likely to have lost. Third, denial of the motion to amend seriously prejudiced the plaintiffs. If the District Court had granted leave to amend, there would have been no basis for continued federal jurisdiction, and the case would have returned to state court. By refusing to grant leave to amend, the District Court retained its jurisdiction over this case, even though there was no case or controversy involving a federal question after September 7, 1993.

The Court of Appeals disregarded the principles stated by this Court in *Foman v. Davis* and denied the plaintiffs' motion to amend even though the principles of

---

[2] Va. Sup. Ct. Rule 3:18 prohibits the use of depositions to support a summary judgment motion absent the consent of the parties. However, there is no prohibition against the use of any other discovery materials in support of summary judgment, such as responses to interrogatories, responses to requests for production of documents, affidavits, requests for admissions, etc.

*Foman* dictated that the motion to amend should have been granted.

II. THE COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S EXERCISE PENDENT JURISDICTION OVER THE STATE LAW CLAIMS IN THIS REMOVED CASE EVEN THOUGH THE PLAINTIFFS HAD MOVED TO AMEND THEIR COMPLAINT AND ABANDON THEIR FEDERAL CLAIM, HAD MOVED TO REMAND THE CASE TO STATE COURT BECAUSE THERE WAS NO FEDERAL QUESTION TO BE DECIDED, AND EVEN THOUGH THE DISTRICT COURT GRANTED SUMMARY JUDGMENT ON THE FEDERAL CLAIM.

Since the federal claim was, and should have been, dismissed prior to trial as part of the proposed amendment to the complaint, the Court of Appeals should have declined to exercise pendent jurisdiction over this removed case and should have remanded the case to the Circuit Court of Augusta County, from whence it was removed. The District Court should not have decided the plaintiffs' state law claims on their merits once the federal claims were dismissed.

The law applicable in this situation was stated in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966) and *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988).

In *Gibbs*, the plaintiff sued the union in federal court, alleging that the union had brought improper pressure on his employer to discharge him. He asserted both a federal claim of violation of the Taft-Hartley Act and a state claim of unlawful conspiracy to interfere with his contract of employment. After verdict for Gibbs, the trial court held that he had failed to establish his federal claim, but the court entered judgment for him on the basis of the state claim. The union argued that the court lacked jurisdiction to give judgment on the state claim because there was no federal jurisdiction once the federal claim was dismissed. The Supreme Court, although holding for the union on the merits, decided that there was pendent jurisdiction to decide the state claim, but held that the trial court should not have exercised jurisdiction in the case.

This Court in *Gibbs* drew a sharp distinction between power and discretion. The Court defined "very broadly," Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction § 3567.1, the power of a federal court to entertain a pendent claim, but then identified a number of factors that the court must consider in exercising its discretion whether to hear the pendent claim.

> On the first question of power, the Court said: Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. Const., Art. III § 2 and the

> relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Leverring & Garrigues Co. v. Morrin*, [citations omitted]. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in the federal courts to hear the whole.

*Id.* at 725 (emphasis in original).

On the separate issue of discretion, the Court asserted flatly that "certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* at 726.

In this case, the Fourth Circuit merely stated that since the motion to amend was properly denied, the Court did not need to reach the issue of jurisdiction. However, once the plaintiff stated that there was no federal case or controversy, the Court of Appeals should have remanded the case to state court, regardless of whether the

amendment was granted. For example, in *Rivanna Trawlers Unlimited v. Thompson Trawlers*, 840 F.2d 236, 243 (4th Cir. 1988), the Fourth Circuit itself wrote:

> The Supreme Court has stated . . . that "certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

In stating this rule, the Court cited its earlier *Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Memorial Hospital, Inc.*, 795 F.2d 340, 342 (4th Cir. 1986), where the Court wrote that "[w]hen it granted summary judgment on the antitrust claim, the district court correctly dismissed the pendent state law claim."

Thus, the rule in the Fourth Circuit is that federal courts should decline to exercise pendent jurisdiction over state law claims, even though the federal courts have the technical power to hear such claims.

Moreover, federal courts may remand, and not dismiss, state law claims which have been removed to federal court by the defendant when the federal claim which formed the basis for removal is dismissed prior to trial. The Supreme Court first articulated this rule in *Carnegie-Mellon University v. Cohill*, 484 U.S. at 350, writing:

> Because in some circumstances a remand of a removed case involving pendent claims will better accommodate those values than will dismissal of the case, the animating principle behind the pendent jurisdiction doctrine supports giving a district court discretion to remand when the exercise of pendent jurisdiction in inappropriate."

In 1990 Congress enacted a statute which tolls the state statute of limitations in removed cases. The enaction of this statute makes the distinction between dismissal and remand of pendent state claims largely meaningless. 28 U.S.C. § 1367(d) (1990).

The application of the *Gibbs* and *Carnegie-Mellon* rules to this case is quite clear. Since the federal Bank Holding Act claim should have been, and was, dismissed prior to trial and, as the Supreme Court stated in *Gibbs*, "certainly, . . . the state claims should be dismissed as well," the District Court's analysis of this case should have stopped with the dismissal of Count XII.[3]

---

[3] In fact, the findings of law or fact made after the dismissal of the federal claim in Count XII were merely obiter dicta. See Rivanna Trawlers Unlimited v. Thompson Trawlers, 840 F.2d 236, 243 (4th Cir. 1988), where the Fourth Circuit stated that Judge Turk's dismissal of the federal claims constituted a dismissal of the state claims pursuant to Gibbs and his statements regarding the validity of the federal claims was mere dicta.

The error in this case is clear. The District Court should not have exercised its jurisdiction to dismiss the state law claims in this case when the plaintiffs had clearly notified the Court that they were abandoning their federal claim as early as September 7, 1993, and when it was clear that there were no federal questions to be decided.

By adjudicating the state law claims when no controversy existed regarding the federal claim, the District Court exceeded its discretion to exercise federal jurisdiction. The District Court should have either dismissed the state law claims for lack of jurisdiction pursuant to *Gibbs* once it dismissed the federal claim, or it should have remanded the state law claims pursuant to *Cohill*. The District Court should not have adjudicated the state law claims on their merits and the Court of Appeals erred by not recognizing this error.

## CONCLUSION

For the reasons stated herein, the petitioners pray that this Court will grant a petition of certiorari in this case and reverse the Court of Appeals' order affirming the District Court's decision to grant summary judgment to the defendant.

Respectfully Submitted,

EDGAR S. SKINNER
ANN J. SKINNER
ARENA SPORTS, INC.

By: _____

Gary M. Bowman, Esq.
VSB No. 28866
P.O. Box 2223
Roanoke, Virginia 24009
(703) 343-7949

# APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Harrisonburg Division

| | | |
|---|---|---|
| Edgar S. Skinner, et al., | ) | Civil Action No. |
| | ) | 93-000-H |
| Plaintiffs, | ) | |
| | ) | ORDER |
| v. | ) | |
| | ) | |
| First American Bank of Virginia, | ) | |
| | ) | |
| Defendants. | ) | |

By: B. Waugh Crigler[4]
U.S. Magistrate Judge

For the reasons set forth from the bench on October 15, 1993, it is

ORDERED

as follows:

1) Plaintiff's Motion to Amend complaint, filed on

---

[4] The parties consented to the exercise of jurisdiction by this court over all pending motions, both dispositive and nondispositive. Pursuant thereto this court entertained argument, decided the issues fro the bench and enters this order which, by further agreement of the parties, is final and appealable to the Court of Appeals for the Fourth Circuit.

September 7, 1993, hereby is denied.

2) Plaintiff's September 7, 1993 Motion to Remand this action to the Circuit Court of Augusta County from which it was removed hereby is denied.

3) Defendant's September 10, 1993 Motion for Summary Judgment hereby is granted on all plaintiff's claims, and judgment hereby enters in favor of the defendant and against the plaintiff on all counts (COUNTS I through XII) of the original Motion for Judgment, which the court here denominates as the original complaint, and which was removed to this court. Plaintiff's action against the defendant hereby is dismissed from the docket of this court.

4) Defendants' September 7, 1993 motion for summary judgment on its Counterclaim against the plaintiffs, Edgar S. and Ann J. Skinner, hereby is granted. Defendant shall have and recover judgment against the plaintiffs/counterclaim defendants Edgar S. Skinner an Ann J. Skinner, in the amount of $ 529,117.89, representing: 1) the principal sum of $ 357,117.89, representing; 2) interest thereon from the date due until the counterclaim was filed on February 26, 1993, in the amount of $ 56,309.05; 3) $ 26,130.78 prejudgment interest accruing at a rate of $ 111.67 per day from February 26, 1993 until the date of entry hereof; and 4) attorney's fees as provided for in the note in the amount of $ 89,335.61 (25% of balance of note). The judgment rate of interest shall run from the date of entry hereof according to law.

5) Unless otherwise directed by this or any reviewing court, or unless a supersedes is posted by

plaintiffs in an amount to be determined by the court, the court hereby directs that, at the election and notification of defendant, M. Clifton McClure, substitute trustee[5], forthwith shall proceed to sell those certain parcels of real estate in Augusta County, Virginia, more particularly described in Schedule A of a deed of trust recorded in Deed Book 1010, page 454 in the Clerk's Office of the Circuit Court of Augusta County, Virginia. The sale, if any, shall occur in accordance with the terms and conditions of any applicable deed of trust, provided, however, that notice of default under the note(s) secured by any such deed of trust shall not be required, as the entry of this final judgment obviates the necessity for notice of default. The trustee shall distribute the proceeds of sale in a manner consistent with the terms of the deed of trust and all accountings required of fiduciaries under applicable Virginia law shall be filed with the appropriate officer of the State Court in the County wherein the property lies, with a certified copy to be filed among the papers of this action.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: /s/
Magistrate Judge

October 20, 1993
Date

---

[5] McClure is a party hereto pursuant to intervention.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

| | | |
|---|---|---|
| Edgar S. Skinner; Ann J. Skinner, and Arena Sports, Incorporated, | ) | |
| Plaintiff-Appellees, | ) | |
| v. | ) | No. 93-2493 |
| First American Bank of Virginia, | ) | |
| Defendant-Appellants. | ) | |

Appeal from the United States District Court
for the Western District of Virginia,
at Harrisonburg.
B. Waugh Crigler, Magistrate Judge.
(CA-93-9-H)

Argued: May 3, 1995

Decided: August 28, 1995

Before MICHAEL and MOTZ, Circuit Judges, and
YOUNG, Senior United States District Judge
for the District of Maryland, sitting
by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

Argued: Gary Michael Bowman, Roanoke, Virginia, for Appellants. Earle Duncan Getchell, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia, for Appellee. ON BRIEF: Robert L. Hodges, Johnathan M. Fine, MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

---

PER CURIAM:

Edgar and Ann Skinner appeal the district court's denial of their motions (1) to amend their complaint to delete several claims, including their sole federal claim, and (2) to remand their case to state court. Finding no error, we affirm.

I.

First American Bank of Virginia agreed to provide financing to Edgar and Ann Skinner for the construction of an indoor recreation facility. The project later became insolvent, and First American threatened to foreclose on a deed of trust securing the Skinners' loan. The Skinners filed a motion for judgment in Virginia state court alleging that First American failed to provide the financing as it had promised. The notion contained a number of state contract and tort claims and one claim alleging violation of a federal statute, the Bank Holding Company Act, 12 U.S.C. Section 1972. First American removed the case to the United States District Court for the Western District

of Virginia on the grounds that the Bank Holding Company Act claim created federal question jurisdiction. In its responsive pleading, First American answered the Skinners' complaint and asserted a counterclaim against the Skinners' seeking judicial foreclosure on the property securing the loan.

The district court's scheduling order set a discovery cut-off of August 20, 1993, and a deadline for the filing of dispositive motions of September 10, 1993. On September 3, 1993, after discovery had been completed and just one week before the deadline for dispositive motions, the Skinners moved to amend their complaint to drop their federal claim and several state claims. At the same time, they moved to remand the case to state court on the grounds that no source of federal jurisdiction remained. The court held a hearing on the motions on September 7, 1993 and took the motions under advisement. On September 10, 1993, First American moved for summary judgment on all counts. In a single order, the district court denied the Skinners' motion to amend and granted First American's motion for summary judgment.

II.

The Skinner's allege two errors on appeal. First, they claim that the district court erred by denying their motion to amend their complaint to remove their one federal claim. Second, assuming that the amendment to the complaint should have been allowed, the district court erred in failing to remand on the grounds that no source of federal jurisdiction remained once the federal claim was dropped. We conclude that the district court did not err in denying the Skinners' motion to amend. The motion to

remand was therefore properly denied.

Fed. R. Civ. P. 15(a) provides that, after the opposing party has served a responsive pleading, a party may amend its complaint only by leave of court. Whether to allow an amendment "rests within the sound discretion of the district court." *Medigen, Inc. v. Public Serv. Comm'n.*, 985 F.2d 164, 167 (4th Cir. 1993). Accordingly, we review the district courts' denial of leave to amend for abuse of discretion. *Id.* at 168.

As a threshold issue, the parties disagree about whether the district court's exercise of discretion regarding the Skinner's motion to amend should have been governed by the standards applicable to Rule 41(a)(2)(voluntary dismissal) or Rule 15(a)(amendment).[4] The effect of the Skinners' amendment would have been to dismiss some, but not all, of their claims. Because Rule 41 provides for the dismissal of *actions*, not *claims*, Rule 15 is technically the property vehicle to accomplish a partial dismissal. *Etheridge v. Harbor House Restaurant*, 861 F.2d 1389, 1392 (9th Cir. 1988); *Gronholz v. Sears, Roebuck & Co.*, 836 F.2d 515, 517-17 (Fed. Cir. 1987); 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice Para. 41.06-1 at 41-92

---

[4]Rule 41(a)(2) provides that after the opposing party has served an answer, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Rule 15(a) provides that after a responsive pleading has been served "a party may amend the party's pleading only by leave of court or by written consent of the opposing party."

to -93 (1995)("Moore's"). However, similar standards govern the exercise of discretion under either rule. *Mechmetals corp. v. Telex Computer Prods., Inc.*, 709 F.2d 1287, 1984 (1983); Moore's at 41-92 ("since the structure of the two rules is similar, and since the district court's discretion is involved when leave of court is required, whether plaintiff's motion is made under Rule 15 or under Rule 41(a)(2), the choice of rules is largely a formal matter."). We therefore analyze the Skinner's claim in light of cases applying both rules.

Rule 15(a) provides that "leave [to amend] shall be freely given when justice so requires." However leave to amend is not to be granted automatically, and the decision whether to do so rests within the sound discretion of the district court. *Deasy v. Hill*, 833 F.2d 38 (4th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *see National Bank of Washington v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988). A district court may properly deny leave in light of undue delay, bad faith, or prejudice to the opposing party. *Deasy*, 833 F.2d at 40; *Pearson*, 863 F.2d at 327-38. In particular, the court may take into account the state of the proceedings when deciding whether to grant leave. *See Deasy*, 833 F.2d at 41 (leave to amend properly denied when motion to amend came right before trial and after discovery was complete).

A motion to dismiss under Rule 41(a)(2) also lies within the district court's discretion. *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987). In considering a motion for voluntary dismissal, a district court must focus primarily on protect the interest of the defendant, and the court may deny the motion if the defendant would be unfairly prejudiced. *Id.*; *see Andes v. Versant Corp.*, 788

F.2d 1033, 1036 (4th Cir. 1986). The expenses of discovery and preparation of motion for summary judgment may constitute prejudice sufficient to support denial of a voluntary dismissal. *Andes*, 788 F.2d at 1036-37. Accordingly, we have noted that "denial of voluntary dismissal is appropriate where summary judgment is imminent." *Davis*, 819 F.2d at 1274 (citing *Pace v. Southern Express Agency*, 409 F.2d 331, 334 (7th Cir. 1969); *see also id.* at 1277 (voluntary dismissal without prejudice improper with respect to claims "faced with imminent adverse determination in a federal action.") (Phillips, J. dissenting);[5] *Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir. 1971)(dismissal under 41(a)(2) would have been properly denied where defendant had already moved for summary judgment.

We believe that, in light of our cases applying Rules 15(a) and 41(a)(2), the district court did not abuse its discretion in denying the Skinners' motion to amend. The motion was made after discovery had been completed

---

[5] Judge Phillips explained the reasoning behind this principle as follows:

> [I]t is unfair to a defendant to let a claimant select forum in which to prosecute her claims, then be allowed to bail out scot-free to try the same claims in another forum after losing on the merits and seeing the adverse handwriting on the wall in the first chosen forum.

*Id.* at 1277 (Phillips, J. dissenting).

and when the case was ripe for summary judgment. *Davis*, 819 F.2d at 1274; *Deasy*, 833 F.2d at 41. If the motion to amend had been granted, First American would have been prejudiced because it had already incurred significant time and expense in discovery and in preparation for a summary judgment motion. *Andes*, 788 F.2d 1033. While we acknowledge that extensive discovery is not prejudicial when the results of discovery may be used in a subsequent action, *Davis*, 819 F.2d at 1276, here a large part of the First American' discovery would likely have been unusable on a motion for summary judgment in state court. First American's discovery included ten depositions, and Virginia rules of practice prohibit the use of depositions to support summary judgment motion absent agreement of the parties. Va. Sup. Ct. R. 3:18 (195). On the other hand, the only apparent effect of the amendment on the Skinners would have been to permit them to dismiss their federal claim and thereby void an adverse ruling in federal court. We do not believe that this is the type of circumstance in which the grant of leave to amend was required. *See Marex Titanic, Inc. v. Wrecked and Abandoned Vessel*, 2 F.3d 544, 547 (4th Cir. 1993)(questioning wisdom of "allowing party . . . to dismiss a case in order to avoid an unfavorable decision on the merits"). Accordingly, the district court's denial of the Skinners' motion to amend was not an abuse of discretion. And, because the district court properly retained the federal claim, it did not err by denying the Skinners' motion to remand.

III.

For the above reasons, we affirm the order of the district court.